

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA HAMILTON, Next Friend of JOSHUA
SCHULTZ, Minor,

UNPUBLISHED
August 21, 2007

Plaintiff-Appellee,

v

ELAINE GROSS,

No. 267522
Livingston Circuit Court
LC No. 04-020836-NI

Defendant-Appellant.

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff¹ in this negligence action arising out of injuries sustained by plaintiff in a motor vehicle accident. We reverse and remand for entry of judgment in favor of defendant, because the trial court erred in denying defendant's motion for a directed verdict.

Defendant argues that the trial court's denial of her motion for a directed verdict was erroneous because plaintiff did not present evidence at trial that his injury rose to the level of a serious impairment of body function. We agree. We review de novo an order denying a motion for a directed verdict. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). Appellate review of motions for a directed verdict requires that the evidence be considered in the light most favorable to the nonmoving party. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006).

In order to recover noneconomic losses based on a defendant's use of an automobile, a plaintiff must meet the statutory threshold for injury established under MCL 500.3135(1), which provides:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured

¹ We will refer to Joshua Schultz, the minor plaintiff in interest, as plaintiff.

person has suffered death, serious impairment of body function, or permanent serious disfigurement.

We note that, at trial, plaintiff only asserted a claim of serious impairment of body function. Thus, despite language in plaintiff's complaint alleging that he also suffered "serious and permanent disfigurement," it is clear that he abandoned any claim of permanent serious disfigurement.

Pursuant to statute, a plaintiff must prove three elements to establish that he or she suffers a "serious impairment of body function": (1) an objectively manifested impairment, (2) of an important body function, (3) that affects the plaintiff's general ability to lead his or her normal life. MCL 500.3135(7). Because it appears undisputed that plaintiff suffered an objectively manifested impairment of an important body function when his ankle was fractured in the relevant accident, the crux of this issue is whether there was evidence to support a conclusion that his injury affected his general ability to lead his normal life.

In *Kreiner v Fischer*, 471 Mich 109, 132-133; 683 NW2d 611 (2004), our Supreme Court stated as follows:

In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life. [Emphasis in original.]

The Court noted that it is

not require[d] that "every aspect of a person's life . . . be affected in order to satisfy the tort threshold" Rather, in a quite distinct proposition, we merely require that the whole life be *considered* in determining what satisfies this threshold, i.e., whether an impairment "affects the person's general ability to lead his or her normal life." [*Id.* at 133 n 16 (emphasis in original; citation omitted).]

The Court then supplied a nonexhaustive list of objective factors to assist in conducting the analysis:

(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily

mandate a finding of a “serious impairment of body function.” Instead, in order to determine whether one has suffered a “serious impairment of body function,” the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment “affects the person’s general ability to conduct the course of his or her normal life.” [*Id.* at 133-134 (citations omitted).]

The Court noted that “[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id.* at 133 n 17.

We conclude that plaintiff did not present sufficient evidence at trial to support a finding that he suffered an impairment that affected his general ability to lead his normal life. There was evidence that plaintiff was on crutches for six to eight weeks after the accident. While this would have limited his activities during that relatively short period, the analysis in *Kreiner* indicates that such limited restrictions do not tend to establish a serious impairment of body function. Particularly, our Supreme Court concluded that there was insufficient evidence that one of the plaintiffs in *Kreiner* suffered a serious impairment of body function where his fracture and surgical wounds had healed within two months, even though he did not work in his primary job for eight weeks. *Id.* at 135. Similarly, assuming for purposes of discussion that plaintiff’s surgery in 2005 that apparently resulted in plaintiff’s being in a cast for three weeks was attributable to the relevant automobile accident, this relatively short period of limitation is not significant evidence of a serious impairment of body function. Although plaintiff testified about some limitations in his activities, particularly related to participation in sports, he presented no evidence that a physician or other medical professional imposed these limitations.² Thus, the evidence presented at trial reflected only self-imposed restrictions in this regard that cannot establish a residual impairment for purposes of showing a serious impairment of body function. *Id.* at 133 n 17. Beyond this, there was only medical testimony regarding an admittedly speculative concern that plaintiff might develop arthritis in the future; this clearly was not sufficient to prove that plaintiff had suffered a serious impairment of body function. Under all the circumstances, we conclude that the trial court erred in denying defendant’s motion for a directed verdict.

In light of our conclusion, we need not reach defendant’s additional issues.

We reverse and remand for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

² Moreover, we note that plaintiff returned to school and held several physically demanding jobs in the years after the accident.